Supreme Court, U.S.
FILED
96 768 NOV 18 1996
OFFICE OF THE CLERK

No.

In The

# Supreme Court of the United States

October Term, 1996

WILLIAM T. WINDLEY and VICTORIA WINDLEY,

*Petitioners,*

*vs.*

CITY OF DOVER,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## PETITION FOR WRIT OF CERTIORARI

LOIS J. DAWSON
712 West Street
Wilmington, Delaware 19801
(302) 984-0331

STEPHEN J. POKINIEWSKI, JR.
*Counsel of Record*
SOL H. WEISS
KRISTIN WERNER
ANAPOL, SCHWARTZ, WEISS & COHAN, P.C.
1900 Delancey Place
Philadelphia, Pennsylvania 19103
(215) 735-2098

*Attorneys for Petitioners*

9955

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, Inc.

## QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit to affirm the Delaware District Court's entry of Summary Judgment based upon the "public building" exception to governmental immunity set forth in 10 Del. C. § 4012(2), where the Court of Appeals' decision departs from Delaware substantive law, which applies the "public building" exception to entry of a public building for the purpose of performing maintenance or repairs?

II. Whether this Court should issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit to affirm the Delaware District Court's entry of Summary Judgment, where Delaware substantive law is inconsistent regarding the scope and application of the "equipment" exception to governmental immunity set forth in 10 Del. C. § 4012(1)?

## LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed appear in the caption of this case.

The parties that do not appear in the caption but were a part of the proceedings below are: POTTS WELDING AND BOILER REPAIR COMPANY, INC., a Delaware Corporation, WSMW INDUSTRIES, INC., a Delaware Corporation, THE BABCOCK & WILCOX COMPANY, a Delaware Corporation, ABB AIR PREHEATER, INC., a Delaware Corporation and ERECTORS, INC., a Delaware Corporation.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented for Review | i |
| List of Parties | ii |
| Table of Contents | iii |
| Table of Citations | iv |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Statutory Provisions Involved | 1 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 8 |
| I. The Court of Appeals' Decision Departs from the Express Language of 10 Del. C. § 4012 and Delaware Appellate Court Decisions Regarding the Scope of the Exceptions to Governmental Immunity. | 8 |
| A. The Exceptions to Immunity Set Forth in 10 Del. C. § 4012 are Designed to Provide Private Citizens with Relief from the Injustices that are Inherent in the Doctrine of Sovereign Immunity. | 8 |

*Contents*

*Page*

B. The Court of Appeals' Decision Ignores the Delaware Superior Court's Holding in *Buckalew v. Cranston Heights Fire Co., Inc.*, Which Extends § 4012 Protection to Members of the Public Injured While Performing Maintenance or Repairs at a Public Building. ..... 10

C. This Court Should Grant Certiorari to Review the Court of Appeals' Decision to Affirm Summary Judgment Based Upon the "Exception" Where the Scope and Application of the Equipment Exception are the Subjects of Numerous Conflicting Decisions Under Delaware Law. ..... 13

Conclusion ..... 19

## TABLE OF CITATIONS

**Cases Cited:**

*Bordas v. City of Neward*, Del. Super., C.A. No. 90 C-09-182 ..... 16

*Buckalew v. Cranston Heights Fire Co., Inc.*, Del. Super. C.A. No. 685 C-SE-122 (April 21, 1987) ..... 10, 12, 13

*Fiat Motors v. Mayor and Council*, 498 A.2d 1062 (Del. 1985) ..... 9, 10, 17

*Contents*

*Page*

*Griggs v. BK Corporation*, 981 F.2d 1429 (3d Cir. 1992) ..... 10, 13

*Moore v. Wilmington Housing Authority*, 619 A.2d 1166 (Del. 1993) ..... 9, 11, 12, 17

*Porter v. Delmarva Power & Light Co.*, 488 A.2d 899 (Del. Super. 1984) ..... 14, 15

*Ritgert v. City of Rehobeth Beach*, 655 F. Supp. 1101 (D. Del. 1987) ..... 14

*Sadler v. New Castle County*, 565 A.2d 917 (Del. 1989) ..... 14, 15, 16

*Sussex County Delaware v. Morris*, 610 A.2d 1354 (Del. 1992) ..... 14, 15

*Triple C. Railcar Service, Inc. v. City of Wilmington*, 630 A.2d 629 (Del. 1993) ..... 15, 16

**Statutes Cited:**

28 U.S.C. § 1254 ..... 1

28 U.S.C. § 1291 ..... 7

28 U.S.C. § 1332(a) ..... 3

10 Del. C. § 4010, *et seq.* ..... 6, 8, 10

*Contents*

*Page*

10 Del. C. § 4011 ..... 1, 2, 8

10 Del. C. § 4011(b)(3) ..... 7

10 Del. C. § 4012 .....2, 3, 7, 8, 9, 10, 11, 19

10 Del. C. § 4012(1) ..... i, 6, 14, 15, 16, 17, 18

10 Del. C. § 4012(2) ..... i, 6, 10, 11, 12, 13, 17

**Rule Cited:**

Supreme Court Rule 13 ..... 1

**APPENDIX**

Appendix A — Judgment Order of the United States Court of Appeals for the Third Circuit Dated August 19, 1996 ..... 1a

Appendix B — Order of the United States District Court for the District of Delaware Dated May 14, 1996 ..... 3a

Appendix C — Order of the United States District Court for the District of Delaware Filed February 7, 1996 ..... 5a

Appendix D — Memorandum Opinion and Order of the United States District Court for the District of Delaware Dated January 18, 1996 ..... 7a

*Contents*

*Page*

Appendix E — Order of the United States District Court for the District of Delaware Dated September 26, 1995 ..... 18a

Appendix F — Order of the United States District Court for the District of Delaware Dated June 14, 1995 ..... 21a

Appendix G — Order of the United States District Court for the District of Delaware Dated June 14, 1995 ..... 23a

Appendix H — Order of the United States District Court for the District of Delaware Dated June 14, 1995 ..... 25a

Appendix I — Order of the United States District Court for the District of Delaware Dated February 23, 1995 ..... 27a

## OPINIONS BELOW

The Opinion in the United States District Court for the District of Delaware in *Windley v. Potts Welding & Boiler Repair Company, Inc., et al.*, Civil Action No. 94-432-SLR, Memorandum Opinion dated January 18, 1996 (Sue L. Robinson, District Judge) is unreported. The United States Court of Appeals for the Third Circuit affirmed the Delaware District Court's entry of Summary Judgment, without Opinion.

## STATEMENT OF JURISDICTION

Petitioners seek to invoke jurisdiction in the Supreme Court of the United States based upon 28 U.S.C. § 1254 which confers jurisdiction upon decisions of the United States Courts of Appeals by Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree. Petitioners' Petition for Certiorari seeks review of the Order of the United States Court of Appeals for the Third Circuit dated August 19, 1996 affirming the decision of the United States District Court for the District of Delaware entering Summary Judgment in favor of The City of Dover and is timely filed within 90 days of the Court of Appeals' decision, pursuant to Supreme Court Rule 13.

## STATUTORY PROVISIONS INVOLVED

### A. 10 Del. C. § 4011 (1979)

§ 4011. Immunity from Suit

(a) Except as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of

> damages. That a governmental entity has the power to sue or be sued, whether appearing in its charter or statutory enablement, shall not create or be interpreted as a waiver of the immunity granted in this subchapter.
>
> (b) Notwithstanding § 4012 of this title, a governmental entity shall not be liable for any damage claim which results from:
>
> > (3) the performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation or resolve under which the discretionary function or duty is performed is valid or invalid.

10 Del. C. § 4011 (1979).

**B. 10 Del. C. § 4012 (1979)**

> § 4012. Exceptions to Immunity.
>
> A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:
>
> > (1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary.

> (2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation.
>
> (3) In the sudden and accidental discharge, disposal, release or escape of smoke, vapors, soot, fumes, acids, alkaline, and toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

10 Del. § 4012 (1979).

## STATEMENT OF CASE

This is a personal injury action to recover for injuries suffered by William T. Windley, Jr., on November 18, 1992 during repair of The Unit No. 2 Air Preheater at the McKee Run Generating Station in Dover, Delaware. Jurisdiction in the United States District Court for the District of Delaware was appropriate based upon diversity of citizenship with the amount in controversy exceeding Fifty Thousand Dollars, pursuant to 28 U.S.C. § 1332(a).

The City of Dover has owned the McKee Run Generating Station for nearly thirty (30) years. The purpose of the McKee Run Generating Station is to generate electricity for use by the public, as well to create revenue for the City of Dover. In fact,

sale of electrical power generates more than fifty percent of the City of Dover's total revenue. In fiscal year 1992/93 alone, the McKee Run Generating Station added $43,890,567 in revenue to the City of Dover. The Unit Number 2 Air Preheater is part of the Power Block Building at McKee Run. In the course of The City's normal use of the Unit Number 2 Air Preheater, every year since the machine was purchased, the air preheater has required maintenance. Each year, the City solicits bids from members of the public for hourly and overtime rates for craft, labor and supervision for the repair of three (3) steam boilers and two (2) hot water boilers, miscellaneous heat exchangers, condensers and plant piping for the period July 1 through June 30 of the succeeding year. The contractors, and their employees, awarded the contract are members of the public who have access to the plant during the course of the repairs. The invitation to bid refers each bidder to the City of Dover's Safety Standards and requires compliance with same.

On May 19, 1992, Potts Welding & Boiler Repair Co., Inc. (hereinafter "Potts") submitted its bid for the period of July 1, 1992 through June 30, 1993. Potts had been the successful bidder for the work at McKee Run for the prior twenty-one (21) years and was once again awarded the contract. Potts began work on the air preheaters on Units 1 and 2 on August 21, 1992. Potts subcontracted some of the labor to WSMW Industries, Inc. (hereinafter "WSMW"), a company that had previously subcontracted work for Potts at McKee Run. WSMW's personnel performed the initial repair on the air preheater for Unit Number 2. Robert Claussen, McKee Run Plant Manger, actively supervised the repairs. The City of Dover found the WSMW repairs more extensive than planned and incorrectly performed. WSMW stopped working at the end of October, 1992.

Potts contracted with Erectors, Inc. to replace WSMW. Erectors hired Petitioner, William Windley, a union millwright

employed by a subcontractor and member of the public, as its general foreman. William Windley and the Erectors crew started work on November 6, 1992, approximately one (1) week after WSMW left. William Windley observed that the welds WSMW used on the upper and lower seal rings on the Unit Number 2 Air Preheater exacerbated the machine's problems. Robert Claussen agreed. To accelerate the repairs to the welds, Robert Claussen required a millwright to sit inside the rotating drum with a special tool to reduce the built up welds. Robert Claussen pressured Potts and Erectors to expedite repairs to the preheater, forcing work around the clock.

On November 18, 1992, at approximately 10:30 p.m., William Windley bent over to talk to Robert Fairful, another employee, who was inside the rotating drum of the Unit Number 2 Air Preheater machining off the excess welds. The rotating drum had been stopped. William Windley placed his head and upper torso inside the access panel, thinking that all of the gate valves had been closed and the motor lever had been locked off according to procedure. Mr. Windley's right knee hit the quick action lever. Suddenly and without warning, the drum rotated, crushing Mr. Windley's pelvis against the side of the panel. In the confusion, William Windley's leg again hit the valve, activating the rotating drum once more and further crushing his pelvis. This time, George Duncan, a Potts employee, closed down the gate valve.

The City of Dover Safety Rules, printed in or around 1972, provide a forty-three (43) page comprehensive procedure for accident prevention. Robert Claussen stated that the Rules applied to employees of the City of Dover and to contractors and subcontractors brought in to McKee Run to perform repairs. Although the Invitation to Bid referred to the Safety Rules, the City of Dover admits that the Rules were not furnished to

WSMW or Erectors employees for the work that was to be performed in 1992 and 1993. Robert Claussen testified that he did not realize the Rules were in existence until after the accident. Norris Hudson, Safety Coordinator for the City of Dover, indicated that he gave a copy of the Rules to John Jones, a principal at Potts, many years before the accident. Norris Hudson felt no need to supply any more copies of the Rules to Potts. Mr. Hudson rationalized if outside workers wanted a copy of the Safety Rules, they could have requested same. Mr. Hudson presupposed their knowledge that such rules existed.

The Safety Rules, in detail, provide the appropriate method for entering confined spaces such as the rotating drum in the air preheater. The Rules state that before an employee enters a confined space, he shall notify his supervisor and shall see that all valves, switches, control devices and other operating mechanisms have been positioned, secured and tagged with danger tags, and are in the "off" position. The rules state that, when working with pneumatic airlines, the air hose should be disconnected from the air source before making adjustments. More importantly, under no circumstances shall safety be sacrificed for speed. Each of these Rules were violated and caused William Windley's accident.

On November 11, 1995, the City of Dover moved the District Court for Summary Judgment contending that the City of Dover is immune from liability pursuant to the County and Municipal Tort Claims Act, 10 Del. C. § 4010, *et seq.* On November 22, 1995, William and Victoria Windley filed their Answering Brief in Opposition to the City of Dover's Motion for Summary Judgment contending that the City of Dover remains liable for William Windley's injuries based upon the "equipment" and "public building" exceptions to governmental immunity set forth in 10 Del. C. § 4012(1) and (2). The Windley's also asserted that the City of Dover's failure to comply with or

enforce its own mandatory safety rules is not a "discretionary act" within the meaning of 10 Del. C. § 4011(b)(3).

In an Order and Opinion dated January 18, 1996, the District Court entered Summary Judgment in favor of The City of Dover, concluding that the McKee Run Generating Station and its appurtenances do not constitute "public buildings" for purposes of the public building exception to immunity because workers, such as William Windley, performing maintenance at the McKee Run Generating Station do not use the facility for its "public purpose". (App. at 7a-17a). The District Court also concluded that the air preheater at issue does not constitute "equipment" for purposes of the "equipment exception" to immunity because it does not pose a particular hazard to members of the public in its normal use or application. (App. at 7a-17a).

On February 14, 1996, William and Victoria Windley timely filed a Notice of Appeal of the District Court's January 18, 1996 Order to the United States Court of Appeals for the Third Circuit, contending that the District Court's entry of Summary Judgment was inappropriate based upon the "equipment" and "public building" exceptions to governmental immunity. In addition, the Windley's asserted that the City of Dover's failure to comply with its mandatory safety rules is not a "discretionary act" within the meaning of 10 Del. C. § 4011(b)(3). Jurisdiction in the Court of Appeals was appropriate based upon 28 U.S.C. § 1291.

On March 20, 1996, William and Victoria Windley Petitioned the Delaware District Court for Certification of Questions of Law to the Delaware Supreme Court relating to the proper interpretation of 10 Del. C. § 4012.

On May 14, 1996, the District Court entered an Order denying William and Victoria Windley's Petition for Certification of Questions of Law. (App. at 3a-4a).

On August 15, 1996, the United States Court of Appeals for the Third Circuit heard oral argument on the Windley's appeal of the District Court's January 18, 1996 Order. In an Order dated August 19, 1996, the Court of Appeals affirmed the decision of the District Court, without Opinion. (App. at 1a-2a).

This is William T. and Victoria Windley's Petition for Certiorari for Review of the Court of Appeals' August 19, 1996 Order.

## REASONS FOR GRANTING THE WRIT

I.

## THE COURT OF APPEALS' DECISION DEPARTS FROM THE EXPRESS LANGUAGE OF 10 DEL. C. § 4012 AND DELAWARE APPELLATE COURT DECISIONS REGARDING THE SCOPE OF THE EXCEPTIONS TO GOVERNMENTAL IMMUNITY.

### A. The Exceptions to Immunity Set Forth in 10 Del. C. § 4012 are Designed to Provide Private Citizens with Relief from the Injustices that are Inherent in the Doctrine of Sovereign Immunity.

Section 4011 of the County and Municipal Tort Claims Act, 10 Del. C. §§ 4010, *et seq.* provides government entities with immunity from suit on tort claims seeking recovery of damages. Section 4012 of the Act delineates the exceptions to § 4011 and provides:

> § 4012. Exceptions to Immunity.
>
> A governmental entity shall be exposed to liability for its negligent acts or omissions

> causing property damage, bodily injury or death in the following instances:
>
> (1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or
>
> (2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation.
>
> (3) In the sudden and accidental discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkaline, and toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water. (62 Del. Laws, c. 124, § 2).

10 Del. C. § 4012.

In *Moore v. Wilmington Housing Authority*, 619 A.2d 1166 (Del. 1993), the Delaware Supreme Court considered the General Assembly's intent in enacting the County and Municipal Tort Claims Act and determined that "the General Assembly was answering [the Delaware Supreme] Court's call to provide wronged private citizens with relief from the injustices that are inherent in the Doctrine of Sovereign Immunity". *Moore, supra*, 619 A.2d at 1169 (*citing Fiat Motors v. Mayor and Council*, 498 A.2d 1062, 1066-67 (Del. 1985). Moreover, the Delaware

Supreme Court stated, "the General Assembly intended to strike a balance between the rights of individuals and the interests of society in general, as represented by municipal entities". *Id.*

It is well-settled that Federal Courts in diversity cases must apply the substantive law of the state whose laws govern the action. *Griggs v. BK Corporation,* 981 F.2d 1429, 1431 (3d Cir. 1992). The Court of Appeals' decision in the case, *sub judice,* departs from the express language of 10 Del. C. § 4012 and Delaware appellate authority regarding the application of the exceptions to governmental immunity. Therefore, this case presents the opportunity for this Court to clarify the Federal Courts' obligations with respect to the application of state substantive law in diversity actions, and to redress the injury to Petitioners caused by the failure of the courts below to consider relevant Delaware authority relating to the scope of the exceptions to governmental immunity set forth in 10 Del. C. § 4012.

**B. The Court of Appeals' Decision Ignores the Delaware Superior Court's Holding in *Buckalew v. Cranston Heights Fire Co., Inc.,* Which Extends § 4012 Protection to Members of the Public Injured While Performing Maintenance or Repairs at a Public Building.**

The "public building exception" to governmental immunity is set forth in § 4012(2) of the County and Municipal Tort Claims Act, 10 Del. C. § 4010, *et seq.* Under § 4012(2), the City of Dover is liable for its negligent acts or omissions causing bodily injury:

> (2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structures, facilities or

> equipment designed for use primarily by the public in connection with public outdoor recreation.

10 Del. C. § 4012(2).

In the case at bar, the Court of Appeals' decision to affirm the Delaware District Court's entry of Summary Judgment based upon its conclusion that entry of a public building for the purpose of performing maintenance or repairs in furtherance of the building's public purpose does not constitute "use of the building for its public purpose" pursuant to 10 Del. C.§ 4012(2), is directly contrary to Delaware appellate authority.

The Delaware Supreme Court's decision in *Moore, supra.*, 619 A.2d at 1169, is the first published opinion by Delaware Courts defining or analyzing the meaning of the term "public building" as it is used in 10 Del. C. § 4012(2). *Id.* The issue in *Moore* was whether a leased dwelling unit owned by a public housing authority is a "public building" for purposes of 10 Del. C. § 4012(2). The Delaware Supreme Court in *Moore, supra.*, outlined the appropriate inquiry to be used by courts in determining which structures constitute "public buildings", for purposes of § 4012. Under *Moore, supra.*, a "public building" is:

> 1. A building and its appurtenances;
>
> 2. operated and maintained by a government entity for a public purpose; and
>
> 3. open to those members of the public who use it for its intended purpose.

*Id.* at 1174-1175.

Applying this test, the Delaware Supreme Court, in *Moore,* concluded that the dwelling unit at issue was a "building", thereby satisfying the first criteria for a public building. The Court also found that providing low cost housing to needy citizens constitutes a legitimate public policy objective, thereby satisfying the second criteria. In addition, the Court concluded that the building was open to members of the public (tenants and guests) who use it for its intended purpose, thereby satisfying the third criteria for a public building. Because all three elements of a public building were present, the Delaware Supreme Court concluded that the dwelling unit at issue is a "public building" for purposes of 10 Del. C. § 4012(2). *Id.*

The *Moore* decision does not address the issue of whether entry into a building by members of the public for the purpose of performing *maintenance* or *repairs* in furtherance of the building's public purpose objectives constitutes "use of the building for its intended purpose", within the meaning of 10 Del. C. § 4012(2). In addition, no Delaware Supreme Court decision since *Moore* addresses this issue.

However, the Delaware Superior Court's decision in *Buckalew v. Cranston Heights Fire Co., Inc.,* Del. Super., C.A. No. 685C-SE-122, Stiftel, J. (April 21, 1987), refused to permit governmental immunity where a member of the public was injured while performing maintenance. In *Buckalew, supra,* a case factually similar to the instant case, the plaintiff entered onto the property of the defendant fire company for the purpose of performing maintenance to a fire truck. The plaintiff suffered injury when he slipped and fell on an accumulation of ice and snow outside the doorway to the garage of the fire company. The defendant fire company moved for Summary Judgment on the basis of its immunity under the County and Municipal Tort Claims Act. The plaintiff argued that the "public building exception" to immunity applied. The Delaware Superior Court

found that the public building exception applied and denied Summary Judgment. Significantly, there was no finding that the plaintiff's entry onto the property to perform maintenance failed to constitute "use of the building for its public purpose."

In the case *sub judice,* Petitioners offered the Delaware Superior Court's decision in *Buckalew, supra.,* in support of their argument that William Windley's injury while performing maintenance and repairs to the Unit Number Two Air Preheater, falls squarely within the "public building" exception to immunity set forth in 10 Del. C. § 4012(2). Instead, the Court of Appeals affirmed the District Court's decision, which did not consider *Buckalew.*

The Court of Appeals' approach is contrary to the specific language of 10 Del. C. § 4012(2), which expressly states that government entities are liable for negligent acts or omissions in the "construction, operation or *maintenance* of any public building or the appurtenances thereto". 10 Del. C. § 4012(2) (Emphasis added). More importantly, the District Court's failure to consider the Delaware Superior Court's decision in *Buckalew, supra.,* was improper and inconsistent with the Court's obligation to "apply the substantive law of the state whose laws govern the action." *Griggs v. BK Corporation,* 981 F.2d 1429, 1431 (3d Cir. 1992). The Court of Appeals' omission thus presents an important question of federal judicial policy, review of which by the United States Supreme Court, is appropriate.

**C. This Court Should Grant Certiorari to Review the Court of Appeals' Decision to Affirm Summary Judgment Based Upon the "Equipment Exception" Where the Scope and Application of the Equipment Exception are the Subjects of Numerous Conflicting Decisions Under Delaware Law.**

The decisions of Delaware Courts are conflicting with

respect to the scope of the "equipment exception" to governmental immunity set forth in 10 Del. C. § 4012(1). In the absence of a definitive statement on this issue, inconsistent decisions have been handed down by Delaware courts, creating uncertainty among both plaintiffs and defendants in Delaware. In the case, *sub judice,* the Court of Appeals' decision to affirm the District Court's entry of Summary Judgment based upon its determination that the Air Preheater involved in William Windley's accident does not constitute "other equipment" for purposes of 10 Del. C. § 4012(1) was inappropriate, given the uncertain state of Delaware law on this issue. Additionally, the Court of Appeals' decision directly conflicts with Delaware's express public policy in favor of a liberal interpretation of the "equipment exception." *See, Sussex County Delaware v. Morris,* 610 A.2d 1354 (Del. 1992); *Sadler v. New Castle County,* 565 A.2d 917 (Del. 1989); *Porter v. Delmarva Power & Light Co.,* 488 A.2d 899 (Del. Super. 1984).

In *Porter, supra.,* the Delaware Superior Court advocated a "liberal but realistic" application of the equipment exception. At issue in *Porter* was whether the City of Dover was immune from suit for injuries to a minor plaintiff who climbed a metal utility pole and came in contact with high voltage electric transmission lines, owned, operated and maintained by the City. The Superior Court defined "equipment", for purposes of 10 Del. C. § 4012(1), as "the implements (as machinery or tools) used in an operation or activity". *Id.* at 906. The Delaware Superior Court interpreted § 4012(1) broadly and held that the City was not immune from liability for the minor's injuries because poles and lines were "equipment" for purposes of § 4012(1). *Id.*

In addition, in *Ritgert v. City of Rehobeth Beach,* 655 F. Supp. 1101 (D. Del. 1987), the Delaware District Court expanded the *Porter* Court's definition of "equipment" under 10 Del. C.

§ 4012(1). The District Court concluded that under Delaware law, the definition of "equipment", for purposes of § 4012(1), includes items which "play a vital role in some operation or activity". *Id.* The District Court also reiterated the Delaware Superior Court's admonition in *Porter, supra.*, for *liberal* but realistic application of the "equipment" exception. *Id.*

The Delaware Supreme Court considered the "equipment exception" in *Sadler, supra.*, 565 A.2d at 917. In *Sadler,* the Delaware Supreme Court acknowledged the ambiguous State of Delaware law on this issue, and expressed its reluctance to "impose a precise standard for application of the equipment exception". *Sadler, supra,* 565 A.2d at 923. Instead, the *Sadler* Court advocated a broad definition of "equipment", which includes items "of unusual design or size . . . which in their normal use or application pose a particular hazard to members of the public". *Id.*

In *Sussex County Delaware, supra.*, 610 A.2d at 1354, the Delaware Supreme Court considered the scope of the equipment exception once again and advocated an even broader reading of the statute to include "defective or inappropriate" equipment, stating:

> Implicit in *Sadler* is the principle that use of defective or inappropriate machinery or equipment may divest a governmental entity of immunity under Section 4012 irrespective of Section 4011(b)(3) [relating to discretionary acts].

*Sussex County, supra,* 610 A.2d at 1358.

In contrast, other Delaware decisions appear to narrow the scope of the "equipment exception". *See, e.g., Triple C. Railcar*

*Service, Inc. v. City of Wilmington,* 630 A.2d 629 (Del. 1993); *Bordas v. City of Newark,* Del. Super., C.A. No. 90 C-09-182, Taylor, J. (April 10, 1992) (clogged storm drain does not trigger the equipment exception).

In *Triple C. Railcar, supra,* a property owner brought an action for damages arising from a series of floods allegedly caused by a clogged tidegate which was owned and operated by the City of Wilmington. The plaintiff contended that the City was not entitled to immunity for its negligent maintenance of the tidegate because the tidegate qualifies as "other equipment" for purposes of 10 Del. C. § 4012(1). The Delaware Supreme Court disagreed and held that the "other equipment exception" was inapplicable because the tidegate did not have characteristics similar to objects that are mobile and/or objects that are particularly hazardous to the public in its normal use. The Delaware Supreme Court construed § 4012(1) narrowly and concluded that the tidegate only became dangerous through negligent repair. The Delaware Supreme Court also found that there was no causative connection between the tidegate and the plaintiff's damages.

The *Triple C. Railcar* decision is problematic in that it is inconsistent with the Delaware Supreme Court's decision in *Sadler, supra.*, rejecting the need for physical similarity between the equipment at issue and that enumerated in the statute, and requiring only that equipment be of a similar "type" to that set forth in the statute. The *Sadler* Court went on to define equipment of a "similar type" as that with "potential to inflict damages and injury when negligently maintained or used." *Sadler, supra.*, 565 A.2d at 923.

More importantly, the *Triple C. Railcar* decision is inconsistent with the plain language of 10 Del. C. § 4012(1) under which governmental entities are liable for negligent acts *or omissions* causing bodily injury:

> (1) In its ownership, *maintenance* or use of any motor vehicle special mobile equipment, trailer, aircraft or *other machinery or equipment,* whether mobile or stationary.

10 Del. C. § 4012(2).

The Court of Appeals' decision in the case at bar ignores the conflicting decisions regarding the "equipment exception" under Delaware law and affirms the District Court's conclusion that maintenance of a product is not part of its "normal use or application" for purposes of 10 Del. C. § 4012(1), despite the express language of § 4012(1) which imposes liability for injuries arising out of "maintenance" of equipment. Significantly, no published Delaware Supreme Court Opinion addresses this issue.[1] In the absence of an affirmative statement by the Delaware Supreme Court on this issue, the Court of Appeals was required to predict how Delaware's highest Court would rule, or certify this case to the Delaware Supreme Court for resolution of this issue. The foregoing examination of Delaware appellate authority establishes that Court of Appeals' decision to exclude maintenance from the "normal use" of the air preheater is contrary to the express language of the statute, as well as the policy underlying Delaware's exceptions to governmental immunity, namely to "provide private citizens with relief from the injustices that are inherent in the Doctrine of Sovereign Immunity." *Moore, supra.*, 619 A.2d at 1169 (*citing Fiat Motors v. Mayor and Council,* Del. Supr., 498 A.2d 1062, 1066-67 (1985). Application of the approach advocated by the Court of Appeals in the case at bar will have the undesirable

---

1. On March 20, 1996, William and Victoria Windley Petitioned the Delaware District Court to certify this question to the Supreme Court of Delaware for resolution. On May 14, 1996, the Windley's Petition for Certification was denied on jurisdictional grounds. (App. at 3a through 4a).

effect of excluding from relief all Delaware workers injured during maintenance or repair of equipment owned by government entities. Such an approach will render the "equipment exception" virtually meaningless.

The Court of Appeals' decision to affirm the District Court's entry of Summary Judgment clearly departs from the express language of 10 Del. C. § 4012(1) and Delaware Appellate decisions regarding the scope of the "equipment exception." Therefore, review of the Court of Appeals' decision by the United States Supreme Court and certification of the issues relating to the 10 Del. C. § 4012 exceptions to governmental immunity are appropriate and necessary to review the propriety of the Court of Appeals' decision to affirm Summary Judgment, particularly where the scope and application of the "equipment exception" are the subjects of numerous conflicting decisions under Delaware law.

## CONCLUSION

The foregoing establishes that the Court of Appeals' decision to affirm the District Court's entry of Summary Judgment departs from the express language of 10 Del. C. § 4012 and is inconsistent with decisions of the Delaware Courts regarding the scope and application of the "public building" and "equipment" exceptions to governmental immunity. The Court of Appeals' decision thus implicates important questions of federal judicial policy, review of which by the United States Supreme Court, is appropriate. For all of the reasons set forth herein, Petitioners William T. and Victoria Windley pray that this Court grant a Writ of Certiorari to review the August 19, 1996 decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

STEPHEN J. POKINIEWSKI, JR.
*Counsel of Record*
SOL H. WEISS
KRISTIN WERNER
ANAPOL, SCHWARTZ, WEISS & COHAN, P.C.
1900 Delancey Place
Philadelphia, Pennsylvania 19103
(215) 735-1130
(215) 735-2098

LOIS J. DAWSON
712 West Street
Wilmington, Delaware 19801
(302) 984-0331

*Attorneys for Petitioners*

**APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AUGUST 19, 1996**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7127

WILLIAM T. WINDLEY; VICTORIA WINDLEY, his wife

v.

POTTS WELDING AND BOILER REPAIR COMPANY, INC., a Delaware Corporation; MSMW INDUSTRIES, INC., A Delaware Corporation; CITY OF DOVER; THE BABCOCK & WILCOX COMPANY, a Delaware Corporation; ABB AIR PREHEATER, INC., A Delaware Corporation

ERECTORS, INC., A DELAWARE CORPORATION,

*Third-party Defendant*

WILLIAM T. WINDLEY, JR.; VICTORIA WINDLEY, his wife,

*Appellants*

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civ. No. 94-00432)
District Judge: Honorable Sue L. Robinson

Argued August 15, 1996

*Appendix A*

BEFORE: GREENBERG and ALITO, *Circuit Judges* and DEBEVOISE, *District Judge**

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court entered January 19, 1996, be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT:

s/ illegible
Circuit Judge

ATTEST

s/ illegible
Chief Deputy Clerk

Dated: August 19, 1996

---

* Honorable Dickinson R. Debevoise, Senior Judge of the United States District Court for the District of New Jersey, sitting by designation.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED MAY 14, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 94-432-SLR

WILLIAM T. WINDLEY, JR. and VICTORIA WINDLEY, his wife,

Plaintiffs,

v.

POTTS WELDING & BOILER CORPORATION CO., INC., a Delaware corporation, and CITY OF DOVER,

Defendants and Third-Party Plaintiffs,

v.

ERECTORS, INC., a Delaware corporation,

Third-Party Defendant.

### ORDER

At Wilmington this 14th day of May, 1996, plaintiffs having filed, on February 14, 1996, an appeal with the United States Court of Appeals for the Third Circuit (D.I. 172); and plaintiffs having subsequently filed, on March 20, 1996, a petition for certification of questions of law to the Supreme Court of Delaware (D.I. 176);

*Appendix B*

IT IS ORDERED that plaintiffs' petition for certification is denied, as the court lacks jurisdiction over the case. *See United States ex rel. Tillery v. Cavell*, 294 F.2d 12, 18 (3d Cir. 1961), *cert. denied, Tillery v. Maroney*, 370 U.S. 945 (1962).

s/ Sue L. Robinson
United States District Judge

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE FILED FEBRUARY 7, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 94-432-SLR

WILLIAM T. WINDLEY, JR., and VICTORIA WINDLEY, his wife

Plaintiffs,

v.

POTTS WELDIING & BOILER CORPORATION CO., INC., a Delaware corporation and CITY OF DOVER,

Defendants and Third-Party Plaintiffs,

v.

ERECTORS, INC., a Delaware corporation

Third-Party Defendant.

**ORDER**

At Wilmington this **7th** day of **February, 1996,**

IT IS ORDERED that a teleconference has been scheduled for **Thursday, February 15, 1996** beginning at **8:30 a.m.** to discuss the status of the on-going negotiations as a result of

mediation in this matter. Counsel for plaintiffs Windley shall be responsible for initiating the conference call.

s/ illegible
UNITED STATES MAGISTRATE JUDGE

## APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED JANUARY 18, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 94-432-SLR

WILLIAM T. WINDLEY, JR. and VICTORIA WINDLEY, his wife,

Plaintiffs,

v.

POTTS WELDING & BOILER REPAIR CO., INC., a Delaware Corporation, WSMW INDUSTRIES, INC., a Delaware Corporation, CITY OF DOVER, THE BABCOCK & WILCOX CO., a Delaware Corporation, AND AIR PREHEATER CORP., succeeded by BABCOCK & WILCOX CO., a Delaware Corporation,

Defendants,

and

POTTS WELDING & BOILER REPAIR CO., INC.,

Third Party Plaintiff,

v.

ERECTORS, INC., a Delaware Corporation,

Third Party Defendant.

*Appendix D*

**ORDER**

At Wilmington this 18th day of January, 1996, consistent with the memorandum opinion issued this same date;

IT IS ORDERED that defendant City of Dover's motion for summary judgment (D.I. 150) is granted. The clerk is directed to enter judgment in favor of defendant City of Dover.

s/ Sue L. Robinson
United States District Judge

*Appendix D*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 94-432-SLR

WILLIAM T. WINDLEY, JR. and VICTORIA WINDLEY, his wife,

Plaintiffs,

v.

POTTS WELDING & BOILER REPAIR CO., INC., a Delaware Corporation, and CITY OF DOVER,

Defendants and Third Party Plaintiffs,

v.

ERECTORS, INC., a Delaware Corporation,

Third Party Defendant.

Lois J. Dawson, Esquire, Wilmington, Delaware, Sol H. Weiss, Esquire, and Kristin Werner, Esquire, of Anapol, Schwartz, Weiss and Cohan, Philadelphia, Pennsylvania, counsel for plaintiffs.

Robert K. Pearce, Esquire, of Trzuskowski, Kipp, Kelleher & Pearch, P.A., Wilmington, Delaware, attorney for defendant City of Dover.

William J. Cattie, III, Esquire, of Heckler & Cattie, Wilmington, Delaware, attorney for defendant Potts Welding and Boiler Repair Company, Inc.

*Appendix D*

Raymond W. Cobb, Esquire, of Saul, Ewing, Remick & Saul, Wilmington, Delaware, attorney for third party defendant Erectors, Inc.

**MEMORANDUM OPINION**

Dated: January 18, 1996

Wilmington, Delaware

s/ Sue L. Robinson
**ROBINSON**, District Judge

## I. INTRODUCTION

Plaintiffs brought this diversity suit after William Windley sustained severe injuries while repairing an air preheater at the McKee Run Power Plant in Dover, Delaware. Defendant City of Dover has moved for summary judgment on the grounds of governmental immunity. For the reasons discussed below, the court will grant defendant City of Dover's motion for summary judgment.

## II. BACKGROUND

The facts of the case relevant to this motion are not in dispute. Defendant City of Dover owns and operates the McKee Run Power Plant, which supplies electricity to the public and generates a substantial amount of revenue for the city. (D.I. 153 at 3) In the spring of 1992, the city solicited bids for maintenance on the plant's equipment, as it had done each year for the nearly thirty years that the plant had been operational. (D.I. 153 at 3) The contract was awarded to Potts Welding and Boiler Repair

Company ("Potts Welding"), which had performed repairs on the McKee Run Plant for twenty-one years. (D.I. 153 at 4) Potts Welding in turn subcontracted first with a company called WSMW, and later with Erectors, Inc., to make repairs on the plant's air preheater number 2. (D.I. 151 at 3; D.I. 153 at 4; D.I. 155 at 4) Plaintiff William Windley, a union millwright, was hired by Erectors, Inc. as its general foreman on the McKee run subcontract. (D.I. 153 at 4-5)

The air preheater is a large self-contained unit with no external moving parts. (D.I. 151 at 5) During the repairs, however, the preheater's access panels were open, and a millwright was working inside a rotating drum on the interior of the preheater. (D.I. 151 at 3; D.I. 153 at 5; D.I. 155 at 6) The accident occurred on November 18, 1992, after the rotating drum had been stopped to allow Mr. Windley to lean into the access panel and converse with the millwright inside the drum. As he did so, Mr. Windley's knee tripped a valve that caused the drum to begin spinning. The drum pinned Mr. Windley to the side of the panel, crushing his pelvis. Two of his coworkers managed to stop the drum from rotating, but in the confusion Mr. Windley again knocked against the valve, causing the drum to crush him further. (D.I. 151 at 3-4; D.I. 153 at 6; D.I. 155 at 7-8)

## III. DISCUSSION

### A. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that a party is entitled to a summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a

judgment as a matter of law." A party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Defendant City of Dover's motion for summary judgment presents only a question of law, namely, whether the city is immune from suit under 10 Del. Code § 4010 *et seq.* There is no dispute among the parties as to the pertinent facts underlying the City of Dover's claim of immunity. This question, therefore, is properly decided at the summary judgment stage.

**B. Statutory Basis for Immunity**

Delaware's Tort Claims Act grants broad immunity to county and municipal entities and their employees within the state. The statute provides:

> Except as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages. That a governmental entity has the power to sue or be sued, whether appearing in its charter or statutory enablement, shall not create or be interpreted as a waiver of the immunity granted in this subchapter.

10 Del. Code § 4011(a). This grant of immunity is waived only in a very narrow range of circumstances:

*Appendix D*

> A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances: (1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary. (2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structure, facilities, or equipment designed for use primarily by the public in connection with public outdoor recreation. (3) In the sudden and accidental discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines and toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

10 Del. Code § 4012. The statute further provides that "[n]otwithstanding § 4012 . . . a governmental entity shall not be liable for any damage claim which results from . . . [t]he performance or failure to exercise or perform a discretionary function or duty. . . ." 10 Del. Code § 4011(b).

In construing these provisions, the Delaware courts have focused on the Act's broad grant of immunity and have interpreted the exceptions narrowly. Plaintiffs and crossclaim defendants Potts Welding argue that the power plant is a public building under § 4012(2), and that the air preheater falls under

the "other equipment" exception of § 4012(1). The opponents of the motion also contend that the city cannot claim the blanket protection of § 4011(b)(3) because the duty to maintain safety was not discretionary. Because the court concludes that none of the exceptions to immunity applies in this case, it is unnecessary to decide whether the city's actions were discretionary.

**C. Public Building Exception**

The opponents of the motion for summary judgment argue that the McKee Run facility falls under the public building exception set forth in § 4012(2). A building does not have to be accessible to the general public to fit within the exception. The Delaware Supreme Court has ruled that to qualify as a public building, a structure must 1) fit the "ordinary dictionary meaning" of the term "building";[1] 2) serve a public purpose;

---

1. The court adopted the following definition of "building":

> 1: a thing built: a: a constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory . . . or other useful structure — **distinguished from structures not designed for occupancy** (as fences or monuments). . . .

*Moore*, 619 A.2d at 1174, *citing Webster's Third New International Dictionary* 292 (1986) (emphasis added). It is not altogether clear to the court that the McKee Run Generating Station fits the definition of a building or appurtenance thereto. The moving party, however, has conceded that the structure in question is an appurtenance to a building. Lacking more complete information, the court will proceed on this assumption.

and 3) be "open to those members of the public who use it for its intended purpose." *Moore v. Wilmington Housing Authority,* 619 A.2d 1166, 1174-75 (Del. Supr. 1993). The parties agree that the McKee Run plant is a building, and that it serves the public purposes of producing electricity and generating revenue for the city. The remaining question, therefore, is whether it is open to members of the public who use it for these purposes.

Plaintiffs and defendant Potts Welding argue that the contractors responsible for making repairs at the McKee Run plant are members of the public, and that their work constituted use of the building for its intended purpose. The court cannot agree. The agreed purposes of the McKee Run Generating Station are generating electricity and raising money for the city. The workers were not present at the facility for the purpose of making electricity or making money for the city. No members of the public must physically enter the power plant to obtain their electricity or pay their electric bills. In its normal operation, when the plant is in fact engaged in fulfilling its intended purpose, no members of the public are required, or even permitted, to come into contact with it at all. The court concludes, therefore, that it would strain the definition of "public building" to include within it the McKee Run Generating Station.

**D. Equipment Exception**

Plaintiffs and defendant Potts Welding maintain that the air preheater in which William Windley was injured constitutes "other machinery or equipment" under § 4012. Although the air preheater would seem to fit a layman's definition of equipment, the Delaware courts have interpreted this term more narrowly, employing the rule of *ejusdem generis. Triple C. Railcar Service, Inc. v. City of Wilmington,* 630 A.2d 629 (Del. Supr. 1993);

*Appendix D*

*Sadler v. New Castle County*, 565 A.2d 917, 923 (Del. Supr. 1989). This rule of construction states that where a general term follows a series of specific terms, the general term is to be construed as applying only to things of the same type as those specifically enumerated. *Black's Law Dictionary* 517 (6th ed. 1990). The Delaware Superior Court articulated the rationale for this interpretive choice in ruling that a stretcher and backboard used by paramedics are not equipment under the statute:

> Motor vehicles, special mobile equipment as defined in Title 21, trailers, and aircraft are instruments which are commonly at the center of tort suits and which, by virtue of their potential to inflict damage and injury when negligently maintained or used, are subject to regulation under our laws. The same cannot be said for the devices here claimed to fall within the exception.

*Sadler v. New Castle County*, 524 A.2d 18, 24 (Del. Super. 1987), *affirmed*, 565 A.2d 917 (Del. Supr. 1989). The air preheater in question bears no resemblance to the devices listed before "other equipment" in the statute.

The Delaware Supreme Court further refined its definition of equipment as "limited to those items of unusual design or size, such as motor vehicles, aircraft or electric transmission lines, which in their normal use or application pose a particular hazard to members of the public." *Sadler*, 565 A.2d at 923 (emphasis added). Plaintiffs maintain that the air preheater poses a danger during "its contemplated use during maintenance." (D.I. 153 at 21) (emphasis added). While the parties agree that the

air preheater in question is of unusual size and design, it was only in the abnormal circumstances of this particular repair that it posed a danger. Under the narrow construction of the exceptions demanded by the statute and case precedent, this court cannot accept plaintiffs' interpretation.

Crossclaim defendant Potts Welding maintains that the air preheater constitutes "equipment" because it is part of the municipal electric system. Potts Welding notes that electrical utility poles and lines have been found to be equipment under the statute, *Porter v. Delmarva Power & Light Co.*, 438 A.2d 899 (Del. Super 1984), *rev'd on other grounds*, 547 A.2d 124 (Del. Supr. 1988), and argues that the air preheater, as an appurtenance to the electrical system, also falls within the equipment exception. The Delaware Supreme Court rejected a nearly identical argument in *Triple C Railcar.* The mere fact that an item is part of a utility system, the court ruled, does not put the item itself in the category of public hazards addressed in the equipment exception. *Triple C Railcar Service, Inc.*, 630 A.2d at 632-33. The court distinguished the tidegate in question in that case from the utility lines judged to be equipment in *Porter,* and concluded that "[u]nlike a dam or tidegate, an electric transmission line presents a constant, ever-present potential for harm simply through contact, even when the equipment is operating as intended." *Id.* at 632. Similarly, an air preheater presents no constant danger of harm simply through contact.

## IV. CONCLUSION

For the forgoing reasons, the court concludes that defendant City of Dover is immune from suit under 10 Del. Code § 4010 *et seq*. The city's motion for summary judgment, therefore, will be granted. An order consistent with this memorandum opinion will issue.

## APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED SEPTEMBER 26, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 94-432-SLR

WILLIAM T. WINDLEY, JR. and VICTORIA WINDLEY, his wife,

Plaintiffs,

v.

POTTS WELDING & BOILER CORPORATION CO., INC., a Delaware corporation, and CITY OF DOVER,

Defendants and Third-Party Plaintiffs,

v.

ERECTORS, INC., a Delaware corporation,

Third-party Defendant.

ORDER

At Wilmington this 26th day of September, 1995, having conferred with counsel;

IT IS ORDERED that:

1. *Settlement Conference.* Pursuant to 28 U.S.C. § 636, this

matter is referred to Magistrate Judge Trostle for the purposes of exploring the possibility of a settlement.

2. *Discovery. All discovery (fact and expert) shall be initiated so that it can be completed on or before December 22, 1995.*

3. *Discovery Disputes.* Should counsel find they are unable to resolve a discovery dispute, they shall jointly call the court to schedule a time for an office conference or telephone conference call to review the matter. Should counsel for a party determine that a discovery dispute requires the court's attention for resolution, he/she shall so inform opposing counsel and discuss the dispute one final time before calling the court to schedule an office conference or telephone conference call to review the matter. Once a conference has been scheduled, each party may file with the court prior to such conference a one-page letter memorandum setting forth the dispute and its position with respect thereto. Motions filed pursuant to Fed. R. Civ. P. 37 without benefit of the above-described informal procedure shall be denied.

Thereafter, should the court find a motion and briefing are necessary, it shall establish an appropriate briefing schedule.

4. *Case and Issue Dispositive Motions.* All case and issue dispositive motions and an opening brief and affidavits, if any, in support of the motion, shall be served and filed on or before December 22, 1995. Briefing shall be presented pursuant to D. Del. LR 7.1.2. If counsel agree that no case or issue dispositive motions are contemplated, they shall so inform the Court on or before December 22, 1995.

*Appendix E*

5. *Pretrial Conference.* On Monday, February 26, 1996, the court will hold a final pretrial conference pursuant to Fed. R. Civ. P. 16(d) and D. Del. LR 16 with counsel beginning at 5:00 p.m. On or before February 12, 1996, plaintiffs' counsel shall forward to defendants' counsel a draft of the pretrial order with the information plaintiffs propose to include in the draft. On or before February 19, 1996, defendants' counsel shall, in turn, provide plaintiffs' counsel with comments on the plaintiffs' draft and the information defendants propose to include in the proposed order. Each party shall include in the draft pretrial order an identification of each expert witness that party expects to call to testify at the trial and a brief statement of the substance of each opinion that expert will testify to at the trial. Unless otherwise ordered by the court, the parties should assume that filing the pretrial order satisfies the pretrial disclosure requirement in Fed. R. Civ. P. 26(a)(3). Where a case is to be tried to a jury, pursuant to D. Del. LR 47 and 51, the parties should file proposed voir dire, instructions to the jury, and special verdicts and interrogatories three full business days before the final pretrial conference.

6. *Trial.* This matter is scheduled for a jury trial commencing on Monday, March 4, 1996, in Courtroom No. 3, Sixth Floor Federal Building, 844 King Street, Wilmington, Delaware. For the purposes of completing pretrial preparations, counsel should plan on each side being allocated a total number of hours to present its case.

7. The parties shall direct any requests or questions regarding the scheduling and management of this matter to Deputy Clerk Lisa Friedkin at (302) 573-6129.

s/ Sue L. Robinson
United States District Judge

## APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED JUNE 14, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 94-432-JLL

WILLIAM T. WINDLEY, JR. and VICTORIA WINDLEY, his wife,

Plaintiffs,

v.

POTTS WELDING & BOILER REPAIR, CO., INC., a Delaware corporation, CITY OF DOVER, and ABB AIR PREHEATER, INC., a Delaware corporation,

Defendants.

ORDER

The Court having granted defendant ABB Air Preheater Inc.'s ("ABB Air Preheater") motion for summary judgment, (Docket Item ["D.I."] 88), based on ABB Air Preheater's statute of repose defense pursuant to 10 Del. C. § 8127, and thus dismissing the plaintiff's claims against it on June 9, 1995, (D.I. 119), it is

ORDERED that defendant Potts Welding & Boiler Repair, Co., Inc.'s cross-claim for contribution or indemnification against ABB Air Preheater, (D.I. 91), and defendant City of Dover's crossclaim for contribution or indemnification against ABB Air Preheater, (D.I. 92), are hereby dismissed.

*Appendix F*

Dated: June 14, 1995.

s/ James L. Latchum
UNITED STATES DISTRICT JUDGE

Copies mailed and/or
delivered this date to:
Lois J. Dawson, Esq.
Sol H. Weiss, Esq.
William J. Cattie III, Esq.
Robert K. Pearce, Esq.
Daniel L. McKenty, Esq.
Kevin Gray, Acting Clerk of Court

## APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED JUNE 14, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 94-432-JLL

WILLIAM T. WINDLEY, JR. AND VICTORIA WINDLEY, his wife,

Plaintiffs,

v.

POTTS WELDING & BOILER REPAIR, CO., INC., a Delaware corporation, CITY OF DOVER, and ABB AIR PREHEATER, INC., a Delaware corporation,

Defendants.

ORDER

The Court having considered defendant City of Dover's motion for leave to file a third-party complaint against Erectors, Inc., (Docket Item ["D.I."] 93), and defendant Potts Welding & Boiler repair Co., Inc.'s motion for leave to file a third-party complaint against Erectors, Inc., (D.I. 94), and no objection having been made within the time limits prescribed by the Local Rules, it is

ORDERED that both motions are granted.

Dated: June 14, 1995.

*Appendix G*

s/ James L. Latchum
UNITED STATES DISTRICT JUDGE

Copies mailed and/or
delivered this date to:
Lois J. Dawson, Esq.
Sol H. Weiss, Esq.
William J. Cattie III, Esq.
Robert K. Pearce, Esq.
Daniel L. McKenty, Esq.
Kevin Gray, Acting Clerk of Court

## APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED JUNE 14, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 94-432-JLL

WILLIAM T. WINDLEY, JR. and VICTORIA WINDLEY, his wife,

Plaintiffs,

v.

POTTS WELDING & BOILER REPAIR, CO., INC., a Delaware corporation, CITY OF DOVER, and ABB AIR PREHEATER, INC., a Delaware corporation,

Defendants.

ORDER

The Court having considered plaintiffs motion for leave to amend their complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure to assert a claim for punitive damages against defendant City of Dover, (Docket Item ["D.I."] 107), and defendant City of Dover having waived its right to respond, (D.I. 110), as did the other remaining defendant Potts Welding & Boiler Repair Co., Inc., (D.I. 115), it is

ORDERED that plaintiffs' motion is granted.

Dated: June 14, 1995.

*Appendix H*

s/ James L. Latchum
UNITED STATES DISTRICT JUDGE

Copies mailed and/or
delivered this date to:
Lois J. Dawson, Esq.
Sol H. Weiss, Esq.
William J. Cattie III, Esq.
Robert K. Pearce, Esq.
Daniel L. McKenty, Esq.
Kevin Gray, Acting Clerk of Court

## APPENDIX I — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED FEBRUARY 23, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION NO. 94-432-JLL

WILLIAM T. WINDLEY, JR. and VICTORIA WINDLEY, his wife,

Plaintiffs,

v.

POTTS WELDING & BOILER REPAIR, CO., INC., a Delaware corporation, MSMW INDUSTRIES, INC., a Delaware corporation, CITY OF DOVER, and AIR PREHEATER, INC., succeeded by Babcock & Wilcox Company, a Delaware corporation,

Defendants.

ORDER

This Court having held a hearing on February 22, 1995 at 10:00 A.M., and having considered the arguments of both plaintiffs' and defendant Air Preheater Corporation's counsel enters the following findings:

1. The plaintiffs have failed to respond to defendant Air Preheater Corporation's motion to dismiss pursuant to Rule 12 (b) (6) of the Federal pRules of Civil Procedure and thereby violated Local Rule 7.1.2.

2. The Court also finds that the complaint failed to state a claim against defendant Air Preheater Corporation upon which relief can be granted.

WHEREFORE IT IS ORDERED THAT the complaint against Air Preheater Corporation is hereby dismissed without prejudice and the plaintiffs are granted leave to amend the complaint with respect to that defendant on or before *March 9, 1995*, subject however to any applicable statute of limitations or statute of repose which may be asserted in defense by Air Preheater Corporation.

Dated: February 23, 1995.

s/ James L. Latchum
UNITED STATES DISTRICT JUDGE

Copies mailed and/or
delivered this date to:
Lois J. Dawson, Esq.
Sol H. Weiss, Esq.
William J. Cattie III, Esq.
Jeffrey K. Martin, Esq.
Robert K. Pearce, Esq.
Daniel L. McKenty, Esq.
J. R. McAllister, Jr., Clerk